

10/27/2022
REFUSED FOR FILING

A reply to an opposition
may not be filed unless
ordered by the court. AR 503(d).

Ryan Montgomery-Sytko
Chief Deputy Clerk

cc: C. Coe
K. Rodgers

RECEIVED

OCT 25 2022

APPELLATE COURT
OF THE
STATE OF ALASKA

IN THE SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, Workers' Compensation
Benefits Guaranty Fund,

Appellant,

v.

Virgil A. Adams, Michael Heath, d/b/a
O & M Enterprises,

Appellees.

Supreme Court No.: S-17918

AWCAC Case No.: 15-029

REPLY TO OPPOSITION FOR APPELATE ATTORNEY FEES

The appellee filed a motion for attorney fees on October 13, 2022 seeking enhanced attorney fees of \$600-700 per hour times 85.4 hours of services provided for representing Mr. Adams or his appeal in this matter. The appellant has filed an opposition to the enhance rate but is not disputing an award of \$375 per hour x 85.4 hours of time.

The rate of \$375 per hour is appellee counsel's non-enhanced rate that was approved by this court, the Board, the Commission in this case in the past; however it has not been enhanced due to this appeal. In past appeals enhanced rates were not requested. Under the recent case of *Rusch v. Southeast Alaska Regional Health Consortium, S. 18038 (9/30/2022)* an enhanced rate can be awarded based on several factors being met that were discussed in Mr. Adams

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motion for appellate fees and supported by the affidavit of counsel discussing numerous factors to be considered.

Arguments In Reply

The Guarantee Fund's primary argument is that the enhanced fee motion should be denied since it takes money from the fund. The Fund as they argue is meant for injured workers who were injured on the jobs or working for uninsured employers. The Fund essentially argues that the Fund does not have money for additional attorney fees and that an award of enhanced fees is unfair, even though counsel is not seeking retroactive enhanced fees for the prior appeal or the appeals before the Commission.

The problem with this argument is that it is inconsistent with *Rusch and Dockter Southeast Alaska Regional Health Consortium, S. 18038 (9/30/2022)* and inconsistent with what happens to other employers who are insured or self-insured. Additionally, the problem with the Fund's argument is that it ignores the fact that unlike an insured carrier the Fund does not set reserve funds for payment of claims that the Fund potentially owes. In this case in June 2017 the amounts owed to Mr. Adams claim and his attorney fees. However, the Fund never raised funds in reserve for this claim. They relied on stays not to pay the awards to Mr. Adams. Had the Fund wisely set aside \$50,000 - \$100,000 per year since 2012-2017 or 2017 to the present, the Fund could pay this claim including fees. Likewise, if they

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chose not to use stays they could have gradually paid Mr. Adams claims including his PTD rate of \$337 per week and his fees. They chose not to do so which resulted in the large sum award being due. This argument that this motion should be denied due to a lack of funds is without merit and inconsistent with the case law. Also, if the Fund owes more than they have in the Fund, they go to the legislature for the money necessary to pay it.

This case really supports an enhanced fee based on the nature and factor that fees in this case are based on a contingent hourly basis. Although not the main factor, this case illustrates that this is a major factor. On June 6, 2017 the Board awarded \$78,000 in fees that have never been paid due to a stay. These fees and Mr. Adams awarded benefits were completely denied when the Fund was initially successful before the Commission on appeal on August 18, 2018. Mr. Adams and his counsel would receive nothing if that decision was not appealed or if the Commission's decision was upheld by this court. All fees awarded including time for the appeal were potentially lost. This illustrates how a contingent fee is a risky way to handle a case. The employee pays nothing, and his counsel takes a substantial risk not to be paid unless the client is successful. This factor should warrant an award of enhanced fees in on appeal due to extreme risks handling an appeal where it is all or nothing based on the outcome.

The fees requested at different rates would total the following amounts:

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Undisputed \$375 per hour x 85.4 hours = \$32,025

Rusch fee \$600 x 85.4 = \$51,240

(73% increase of \$375) - 650 x 85.4 = \$55,510

(86% increase of \$375) - 700 x 85.4 = \$57,780

Appellee maintains that the factors in this case especially considering what it took for Mr. Adams to finally prevail warrant an enhanced fee between \$600-\$700 per hour appellate fees.

DATED this 25th day of October, 2022.

CHARLES W. COE
Attorney for Appellee



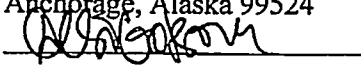
Charles W. Coe
ABA#7804002

I certify that on October 25, 2022,
I served a copy of the foregoing by
Email upon:

Kimber Rodgers
Assistant Attorney General
1031 West 4th Avenue, Suite #200
Anchorage, Alaska 99501

And by U.S. Mail upon:

Michael Heath
P.O. Box 240162
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